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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 557

UNITED STATES OF AMERICA, APPELLANT

v.

INTERNATIONAL MINERALS AND CHEMICAL
CORPORATION

ON CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

STATEMENT RESPECTING JURISDICTION

OPINIONS BELOW

The order of the court of appeals certifying the case to this Court (Appendix A, *infra*) is not reported. The memorandum opinion and order of the district court dismissing the indictment (Appendix B, *infra*) is not yet reported.

JURISDICTION

On May 11, 1970, the district court granted a pre-trial motion to dismiss the information charging non-compliance with a regulation (49 C.F.R. 173.427) requiring a shipper offering for transport any dangerous article to describe the article on the shipping papers, in violation of 18 U.S.C. 834(f). The court found that "knowledge of violating the above I.C.C.

regulation is an essential element of the crime charged under 18 U.S.C. 834(f)" and that the government failed to allege such knowledge.

On June 8, 1970, the government took an appeal to the Court of Appeals for the Sixth Circuit, but later moved to certify the case to this Court. The court of appeals, after hearing argument on the question of jurisdiction, certified the case to this Court pursuant to 18 U.S.C. 3731 (Appendix A, *infra*, p. 17). This Court docketed the case on August 14, 1970. The validity of this determination is discussed *infra*.

QUESTION PRESENTED

Whether 18 U.S.C. 834(f), imposing criminal liability upon anyone who "knowingly" violates authorized regulations dealing with the transportation of hazardous and dangerous materials, requires actual knowledge of the regulations and a specific intent to violate them.

STATUTES AND REGULATION INVOLVED

18 U.S.C. 3731 provides in part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is based.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * * *

If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

18 U.S.C. 834(a) provides:

The Interstate Commerce Commission shall formulate regulations for the safe transportation within the United States of explosives and other dangerous articles, including radioactive materials, etiologic agents, flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any carrier engaged in interstate or foreign commerce by land or water.

18 U.S.C. 834(f) provides:

Whoever knowingly violates any such regulation shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

49 C.F.R. 173.427 provides in part:

(a) Each shipper offering for transportation any dangerous article subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name prescribed in § 172.5 of this chapter * * *. Abbreviations must not be used. * * *

STATEMENT

On March 2, 1970, the United States filed a five-count information against appellee, a New York corporation which manufactures and ships various chemicals, fertilizers and other materials. Count 3 of the information reads as follows:

On or about April 15, 1969, at Lockland, in the State and Southern District of Ohio, Western Division, International Minerals and Chemical Corporation, defendant, a corporation, a shipper of property in interstate commerce, and as such shipper subject to the regulations prescribed by United States Department of Transportation¹ applying to shipments of ex-

¹ The functions, duties, and powers of the Interstate Commerce Commission to regulate transportation of hazardous materials were transferred to the Secretary of Transportation in section 6(e)(4) of the Department of Transportation Act, 80 Stat. 937, 49 U.S.C. (Supp. V) 1655(e)(4).

plosives and other dangerous articles made by way of common, contract, and private carriers of property by public highways (49 C.F.R. 171 through 179), did offer for transport in interstate commerce from Lockland, Ohio, to Louisville, Kentucky, to Ecoff Trucking, Inc., a shipment of 1 truckload, Sulfuric Acid and did knowingly fail to show on the shipping papers the proper name, Sulfuric Acid, and the required classification of said property, to wit, Corrosive Liquid, in violation of 49 C.F.R. 173.427 (18 U.S.C. 834).

Counts 1, 2, 4, and 5 are substantially identical to Count 3, except that some counts allege that the defendant "did knowingly fail to show on the shipping papers" only the required classification.

Appellee filed a motion to dismiss the information pursuant to Rule 12(b)(2), F.R. Crim. P. While admitting to "technical violations of the regulations" (D. Mem. p. 3),² it contended that the allegation in the information of "knowing failure" to show the proper classification on shipping papers failed to satisfy the requirement of 18 U.S.C. 834(f) that a "knowing violation" of the "regulation" be shown. In granting the motion, the district court relied on various precedents discussed *infra*, including this Court's decision in *Boyce Motor Lines v. United States*, 342 U.S. 337. It held that knowledge of the regulation, in addition to deliberate performance of acts constituting a violation of the regulation, "is an essential element

² "D. Mem." refers to appellee's memorandum in support of its motion to dismiss in the district court, included in the record filed with the Clerk.

of the crime charged." The information was dismissed for failure to allege such knowledge. Appendix B, *infra*, pp. 19-21.

THE QUESTION OF JURISDICTION

Although the United States initially took an appeal in this case to the court of appeals, on further analysis it became evident that the ruling of the trial judge was founded upon a construction of the phrase in the underlying statute, 18 U.S.C. 834(f), which reads: "knowingly violates * * * such regulation." The decision is therefore properly appealable directly to this Court pursuant to the first paragraph of 18 U.S.C. 3731, *supra*, p. 2.

In *United States v. Mersky*, 361 U.S. 431, the dismissal of an indictment on the basis of a construction of regulations promulgated pursuant to an import statute was held to be appealable only to this Court, since the regulations, by defining the prohibited conduct, directly amplified the statute. The district court's decision in *Mersky* construing the regulations was thus found to be in effect a decision construing the statute.³ Here, while the prohibited conduct also is defined in the regulations, the trial court's decision rests on an interpretation of specific language in the statute, rather than on a construction of the implementing regula-

³ Compare *United States v. Weller*, No. 77, this Term (motion to remand denied and question of jurisdiction postponed to the merits, 397 U.S. 985), where the regulations construed did not define the prohibited conduct; the government there argues that the *Mersky* rationale does not apply and the case, which was initially appealed to this Court, should be certified to the court of appeals. Brief for United States, pp. 13-21.

tions. Accordingly, the jurisdiction of this Court is established without resort to the *Mersky* rationale.

THE QUESTION IS SUBSTANTIAL

1. The district court's holding—that the statutory language, “knowingly violates * * * such regulation,” requires an allegation and proof of a specific intent to violate the terms of a known regulation—is at odds with the fundamental concept in our jurisprudence that criminal culpability need not depend on actual knowledge of the law. As this Court has recognized, the rule that “ignorance of the law will not excuse” is “deep in our law.” *Lambert v. California*, 355 U.S. 225, 228. It is, of course, a principle of general application that knowledge of the provisions or existence of a statute is not required for the most serious of crimes, such as murder, bank robbery, or kidnapping. The deliberate (*i.e.*, knowing) commission of prohibited acts constitutes the crime and creates criminal liability, irrespective of whether the person who acts is aware of the specific statute which punishes his conduct.⁴

⁴ *Lambert v. California*, *supra*, represents an exception. There the Court held invalid a city ordinance purporting to impose criminal penalties on any “convicted person” who failed to register himself as such after remaining more than five days in Los Angeles or coming more than five times per month into the city. The Court held that the ordinance was unconstitutional as applied to someone who did not have actual knowledge of its provisions, finding that the principle that every man is required to know the law could not be extended to the situation in that case of “conduct that is wholly passive” and of a type which would not “alert the doer to the consequences of his deed.” 355 U.S. at 228. *Lambert* is distinguishable from the instant case since (1) the conduct prohibited by the safe

The decision of the district court to the contrary is based on a misinterpretation of this Court's decision in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337. In *Boyce*, the petitioner was charged, under former 18 U.S.C. (1940 ed.) 235 (which is identical insofar as here pertinent to the present statute), with violating a regulation providing that drivers of motor vehicles transporting any explosive or inflammable substance "shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares * * *." The indictment there alleged that petitioner routed its trucks, carrying an inflammable liquid, into Holland Tunnel, notwithstanding the availability of more practical routes, and that petitioner "well knew" this to be in violation of the applicable regulation. The precise question presented in *Boyce*, which the Court answered in the negative, was whether the regulation was void for vagueness. The *scienter* element of the statute was not directly drawn into question. In its opinion, however, the Court stated as part of its rationale (342 U.S. at 342) (footnotes omitted):

The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid. That is evident from a considera-

transportation regulation is not a failure to act but misfeasance and (2), as shown *infra*, persons doing business as truckers have an affirmative obligation to acquaint themselves with the regulations applicable to their business.

tion of the effect of the requirement in this case. To sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route.

Also noted was the fact that, by regulation (49 C.F.R. 197.02⁵), the officers, agents and employees of every motor carrier concerned with the transportation of explosives and dangerous articles are required to "become conversant" with the above and other regulations applying to such transportation.⁶ 342 U.S. at 342 n. 15.

As clearly reflected by the quoted language, the Court in *Boyce* was not saying that specific knowledge of the existence or terms of the regulations—i.e., knowledge of the law—had to be proved. Rather, the decision focused on the traditional requirement that the defendant have made a conscious choice to do the act constituting the substantive violation, something that

⁵ Currently 49 C.F.R. 397.02.

⁶ In this connection, we point out that the provisions of the present statute, 18 U.S.C. 834(d), which require publication of penal regulations and a subsequent ninety-day waiting period before they become effective, clearly provide ample notice. Contrast *Lambert v. California*, 355 U.S. 225, discussed *supra*, n. 4.

Boyce did only if it knew the fact that another route was available. Mr. Justice Jackson, dissenting in *Boyce* as to the vagueness issue, indicated a similar interpretation, commenting that he did not "suppose the Court intend[ed] to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense." The Justice observed that typically "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." 342 U.S. at 345. See also *United States v. Illinois Central Railroad*, 303 U.S. 239; *Morissette v. United States*, 342 U.S. 246, 270-271.

This is precisely the point to be made here. Indeed, the Tenth Circuit recently so construed the present statute. In *Texas-Oklahoma Express Inc. v. United States*, C.A. 10, No. 9-70, decided July 27, 1970, involving a conviction under 18 U.S.C. 834(f) for knowingly violating a regulation forbidding motor vehicles transporting certain classes of explosives from being "left unattended at any time during the course of transportation," the court (after analyzing *Boyce* and the cases relied on below) concluded (slip opinion, p. 9):

Here * * * it is necessary to show but one step—that the trailer was intentionally left unattended, and not two steps—that a violation of the Regulation was intended and the truck was left unattended. * * *

See also *United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814, 821 (D. Md.); cf. *Steere Tank Lines*,

Inc. v. United States, 330 F. 2d 719 (C.A. 5), and cases cited.⁷

2. This interpretation is consistent with the legislative history of 18 U.S.C. 834, which was enacted in response to the First Circuit's decision in *St. Johnsbury Trucking Co. v. United States*, 220 F. 2d 393. In that case, a corporation had been prosecuted for failing properly to placard its truck with "danger" signs, as required by I.C.C. regulation (49 C.F.R. (1956 Rev.) 77.823), due to an error by a rating clerk in labeling the shipping papers. The district court held that former 18 U.S.C. (1940 ed.) 235 required no element of a criminal intent to violate the regulation; it was enough to make out an offense by showing that the wrongdoer had knowledge of the dangerous nature of the commodity and its volume.⁸ The court of appeals reversed, however, in *St. Johnsbury*, indicating that culpable intent to evade the regulation was an element of the offense.⁹

Senator Magnuson accordingly introduced a bill to amend the statute in April 1957, proposing that the

⁷ The Seventh Circuit in *United States v. Chicago Express, Inc.*, 235 F. 2d 785, reversing a conviction on the ground that the judge had failed to charge on intent, indicated that it viewed knowledge of the regulation as an element of the offense. In our view this aspect of the decision is erroneous.

⁸ The regulation there under consideration made it an offense to transport in an unmarked vehicle specified explosives weighing more than a certain number of pounds gross weight (49 C.F.R. (1956 Rev.) 77.823).

⁹ While the case does not actually hold that knowledge of the regulations, which was shown to exist in that case, is necessary to criminal intent, it was subsequently so interpreted (*infra*, pp. 12-13).

phrase "whoever knowingly" be deleted and there be substituted the words "[whoever] being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles." 105 Congressional Record 6755-6756. The written "justification" for this change (reprinted at 105 Congressional Record 6755-6757) discussed the opinions in *Boyce Motor Lines, Inc., supra*, and interpreted *St. Johnsbury Trucking Co., supra*, as requiring as an element of the offense knowledge of the specific provisions of an I.C.C. regulation. It noted that an earlier report of the Senate Interstate and Foreign Commerce Committee (S. Rep. No. 901, 86th Congress, 1st Session) had rejected the I.C.C.'s recommendation to eliminate, without substitution, the term "knowingly," and make the offense a type of "public welfare" crime (as discussed in *Morissette v. United States*, 342 U.S. 246, 252-260), in which no element of *scienter* need be shown and the commission of the act alone suffices for criminal responsibility. While admitting that, because of the "added peril inherent in the transportation of the commodities concerned, statutory creation of an absolute liability does not seem unreasonable," the "justification" elected to follow language recommended by the Senate Committee, *supra*, as a compromise.¹⁰

The intended thrust of the amendment was to impose criminal liability where it could be shown that

¹⁰ The "justification" noted that the I.C.C. regarded the proposal as a "substantial improvement over the present provisions." 105 Cong. Rec. 6756-6757.

there was general knowledge of the existence of regulations covering the transportation of explosives and other dangerous substances; however, there would be no need to show knowledge of specific provisions of a violated regulation. On September 9, 1957, Senator Magnuson's bill passed the Senate (105 Cong. Rec. 18739-18740); it was referred to the House Committee on the Judiciary on September 11, 1957, as an amendment to (renumbered) Section 834(f). The staff memorandum of the House Committee (reprinted in the Committee Report, H. Rep. No. 1975, 86th Cong., 2d Sess., pp. 14-19) urged deletion of the Senate amendment, taking the position that, notwithstanding the suggestion in *St. Johnsbury Trucking*, the then existing statute, properly construed, required proof of *scienter* not in terms of knowledge of the applicable law but only in the sense that the prohibited conduct be done knowingly rather than inadvertently. The memorandum stated (H. Rep. No. 1975, 86th Cong., 2d Sess., p. 17):

There is * * * reason to believe that the [Senate] bill would impose on the Government a more stringent requirement of proof than does the present law as construed by the Supreme Court, though an opinion of a very able lower appellate court judge,¹¹ which has no doubt had considerable impact * * *, read the statute as casting an even heavier burden on the Government. * * *

¹¹ Referring to Judge Magruder's concurring opinion in *St. Johnsbury Trucking*.

The House Committee determined to strike out the Senate amendment and re-substitute the term "knowingly." The Report stated (*id.* at p. 2):

The present Transportation and Explosives Act requires that a violation "knowingly" be committed before penalty may be inflicted for such violation. Under the present law there is judicial pronouncement as to the standards of conduct that make a violation a "knowing" violation. The instant bill would change substantially the quantum of proof necessary to prove a violation since it provides that "any person who being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of explosives and other dangerous articles" is guilty if there is a noncompliance with the regulations. Such language may well create an absolute liability for violation. * * * Since the penalties prescribed for violation of the Explosives Act are substantial and since proof required to sustain a charge of violation of such regulations under the bill would require little more than proof that the violation occurred, it is the considered opinion of the committee that such a substantial departure in present law is not warranted. It is the purpose of this amendment to retain the present law by providing that a person must "knowingly" violate the regulations.

As so amended by the Judiciary Committee the bill passed the House on August 23, 1960. 106 Cong. Rec. 17261-17262. The Senate concurred in the House amend-

ments on August 26, 1960 (106 Cong. Rec. 17789), and the bill in its present form was subsequently enacted.

In this context, it is clear that enactment of the present statute was by no means an endorsement by Congress of the interpretation of the term "knowingly" suggested in *St. Johnsbury Trucking*. Rather, the intent as reflected in the House Committee Report phrase "to retain the present law", was simply to preserve the existing statutory language as requiring knowing performance of the acts constituting a violation (an element that the Committee's report, unlike the memorandum of its staff, thought was eliminated by the Magnuson proposal). There is no reason to believe that the Committee did not accept the view of its staff that, notwithstanding *St. Johnsbury Trucking*, knowledge that a regulation was being violated was not required. This is wholly consistent with the view we urge here—that 18 U.S.C. 834(f) does indeed demand proof of *scienter* (as opposed to being *malum prohibitum* legislation of the sort discussed in *Morisette*), but that the knowledge requirement relates, as is traditional in our law, to the facts or conduct involved and not to the legal provisions that prohibit that conduct. Since the information in this case clearly alleged, as to all counts, that the appellee "did knowingly" do the acts which constitute violations of the applicable regulation, the district judge erred in granting the motion to dismiss.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

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SEPTEMBER 1970.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cincinnati, Ohio 45202

No. 20,519

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
DEFENDANT-APPELLEE

MOTION TO CERTIFY CASE TO THE SUPREME COURT OF THE UNITED STATES

The United States of America, Appellant, moves the Court to certify the above entitled appeal to the Supreme Court of the United States, pursuant to Section 3731, Title 18, United States Code, the appeal taken being from a decision of the District Court dismissing the information against the Defendant, which decision is based upon a construction of Section 834 (f), Title 18, United States Code, upon which the information is founded.

WILLIAM W. MILLIGAN,
United States Attorney.
NORBERT A. NADEL,
Assistant U.S. Attorney.

Granted: PECK, J.



APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF OHIO, WESTERN DIVISION

No. 11,616

UNITED STATES OF AMERICA, PLAINTIFF

v

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
DEFENDANT

MEMORANDUM OF DECISION AND ORDER

There is pending for decision a motion to dismiss the five-count information which started this prosecution March 2, 1970. The motion is made pursuant to Rule 12 (b) (2) F. R. Crim. P.

Title 18 U.S.C., section 834(a) commands the Interstate Commerce Commission (hereinafter I.C.C.) to formulate regulations for safe transportation of explosives and other dangerous articles. Pursuant to that section the I.C.C. promulgated the following regulations:

(A) Each shipper offering for transportation any dangerous article subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name prescribed in Section 172.5 of this chapter and by the classification prescribed in Section 172.4 of this chapter, and may add a further description not inconsistent therewith. 49 C.F.R., section 173.427.

Section 834(f) of 18 U.S.C. provides:

Whoever *knowingly* violates any such regulation shall be fined not more than \$1,000 or imprisoned not more than one year, or both... (emphasis added).

The five counts contained in the information are bottomed on the above regulation in its relation to section 834(f) in that they charge the defendant with knowingly failing to show on its shipping papers the required classification, or name and classification, of the property shipped. The information does not, however, charge that the defendant knowingly violated the above regulation and such an omission, defendant contends, requires dismissal. In other words, the defendant asserts that there is a vast difference between intending not to do the act(s) which a statute commands and, on the other hand, purposely not doing such an act but with the added ingredient of a consciousness that it is illegal not to so do.

On the basis of *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *St. Johnsbury Trucking Co., Inc. v. United States*, 220 F. 2d 393 (1 Cir., 1955); *United States v. Chicago Express Inc.*, 235 F. 2d 785 (7 Cir., 1956); *United States v. Deer*, 131 F. Supp. 319 (E.D. Wash. N.D. 1955); *United States v. Chicago Express, Inc.*, 172 F. Supp. 613 (E.D. Ill., 1959), aff'd 273 F. 2d 751 (7 Cir., 1960) we find that knowledge of violating the above I.C.C. regulation is an essential element of the crime charged under 18 U.S.C. section 834(f).

Hence, failure to make such an allegation(s) in the information warrants granting defendant's motion to dismiss. *Rudin v. United States*, 254 F. 2d 45 (6 Cir., 1958).

Accordingly the motion is granted, and each count in the information is dismissed.

DAVID S. PATE, *Judge*.

A True Copy of the Original Filed May 11, 1970.

Attest:

JOHN D. LYTER, *Clerk*.

By ROBERT S. KING, *Deputy*.

Certified May 11, 1970.